APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 2974 - Phx.

ALBERT J. DOIG, on Behalf of Himself and All Other Shareholders of Provident Security Life Insurance Company, *Plaintiff*

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, UNITED SECURITY LIFE, ANGUS J. DEPINTO, ELMER W. DUHAME, FRANCIS I. SABO, EDWIN B. PEGRAM, AND HJALMAR B. LANDOE, *Defendants.*

AFFIDAVIT OF BIAS OR PREJUDICE

STATE OF ARIZONA
County of Maricopa, ss:

ANGUS J. DePINTO, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action and makes this Affidavit pursuant to the provisions of 28 U.S.C.A., § 144; that the Honorable George H. Boldt, before whom this matter is pending, has a personal bias or prejudice either against Affiant or in favor of Plaintiff; that the facts and the reasons for Affiant's belief that bias or prejudice exists are as follows:

Upon the original trial of this action the jury rendered a special verdict wherein it found that Affiant was not guilty of negligence or breach of fiduciary duty which proximately caused or contributed to cause loss and damage to United Security Life, the predecessor in interest of Provident Security Life Insurance Company.

Plaintiff moved that all of the verdicts be set aside and that judgment be entered against Affiant and others in accordance with plaintiff's Motion For a Directed Verdict, which was made at the close of the testimony. Judge Boldt refused to give effect to the jury verdict and granted judgment for the plaintiff N.O.V. He erroneously refused to recognize the verdict of the jury as having any binding effect.

During the trial, the defendants offered in evidence a Merger Agreement pursuant to which United Security Life had been merged in Provident Security Life Insurance Company after the filing of the action. Judge Boldt rejected the offer and held that there was no issue as to the merger and that any evidence with respect thereto was irrelevant and immaterial. When Mr. Rehnquist, an attorney for one of the defendants, attempted to pursue the matter, he was charged by Judge Boldt with contempt and with attempting to pettifog deliberately and with malice aforethought.

After entry of judgment, Affiant filed a motion for new trial raising numerous legal questions and also pointing out specific errors in the findings of fact entered by Judge Boldt. The Judge apparently gave little, if any, consideration to the motion, notwithstanding the fact that Finding No. 19(d) was contrary to the undisputed evidence.

After the Judgment was reversed by the Court of Appeals for the Ninth Circuit in Cause No. 17114 and the case was remanded to the District Court for further proceedings, Judge Boldt again failed to give objective consideration to the legal and factual questions raised by Affiant. At a pretrial conference held on March 9, 1962, Judge Boldt admonished attorneys for the defendants

that they should not "go shopping" for another judge; that he intended to stay with the case until its conclusion. Insofar as known to Affiant, this warning was wholly unprovoked.

Affiant moved that Judgment be entered in his favor upon the jury's verdict and in the alternative demanded a trial by jury of all of the issues herein. The motion was summarily denied. Notwithstanding Affiiant's objections, Judge Boldt entered supplemental findings of fact and conclusions of law wherein he failed to correct or modify his original Finding No. 19(d) which was contrary to the evidence. In addition to again entering Judgment against Affiant in the amount of $314,794.19, Judge Boldt erroneously elected to include interest thereon from October 18, 1957, which had the effect of increasing Affiant's liability to the extent of approximately $100,000. The second judgment was reversed by the Court of Appeals, in Cause No. 18245.

After the remand of this case to the lower court following the first appeal, Gorsuch filed an action against Provident Security Life Insurance Company for the purpose of attempting to set aside the merger of United Security Life with Provident. In that case Judge Boldt denied a Motion For Summary Judgment filed on behalf of Provident. He then granted plaintiff's Motion For Default and Motion For Summary Judgment. Provident's Motion to have the default set aside was denied. The Court of Appeals held that the failure of Judge Boldt to grant Provident's Motion to open the default was an abuse of discretion. The Court of Appeals also held that Judge Boldt had erred in at least four particulars in entering Judgment setting asde the merger.

On the 24th day of September, 1964, Affiant's attorney,

Jos. S. Jenckes, Jr., transmitted to Judge Boldt a letter requesting that he consent to the transfer of this case to another Judge, a copy of such letter being attached hereto as Exhibit "A", and by reference incorporated herein. On October 9, 1964, Judge Boldt wrote a letter to Mr. Jenckes in which he rejected such request, a copy of which letter is attached hereto as Exhibit "B", and by reference incorporated herein.

On the 13th day of April, 1964, attorneys for plaintiffs filed herein a Motion For Summary Judgment on Issue of Liability Only. Notwithstanding the fact that the granting of such Motion will be in derogation of and contrary to the mandate and decision of the Court of Appeals For the Ninth Circuit (*DePinto v. Provident Security Life Insurance Company*, 323 F. 2d 826), requiring a new trial before a jury, Judge Boldt has issued a Memorandum dated November 9, 1964, a copy of which is attached hereto as Exhibit "C", and by reference incorporated herein, which Memorandum discloses that Judge Boldt intends to consider said Motion For Summary Judgment on the merits.

It is Affiant's belief that Judge Boldt is not able to consider the issues involved in this action with an open mind. The record demonstrates the inability of Judge Boldt to view the affairs of United Security Life with that degree of judicial detachment and objectivity which should govern all actions of a trial judge.

Affiant believes that in the light of *Whitaker v. McLean* (C.A., D.C.) 118 F. 2d 596, and *U.S. v. Ritter* (10th Cir.) 273 F. 2d 30, this Affidavit is timely and within the purview of 28 *U.S.C.A.*, § 144.

s/ Angus J. DePinto
Angus J. DePinto

Subscribed and sworn to before me this 20th day of November, 1964.

My commission expires: Mar. 4, 1968, Alice J. Fitch, Notary Public

(N.S.)

CERTIFICATE OF COUNSEL

JOS. S. JENCKES, JR., counsel for Angus J. DePinto, hereby certifies that the foregoing Affidavit is made in good faith.

JOS. S. JENCKES, JR.
Jos. S. Jenckes, Jr.

[Certificate of Service]

EXHIBIT A

September 24, 1964

The Honorable George H. Boldt
United States District Judge
United States Courthouse Building
Tacoma, Washington

Re: Gorsuch & Doig v. Provident Security & DePinto & Duhame - Civil No. 2974, Phx.

Dear Judge Boldt:

I have received copy of Lee McLane's letter to you of September 20, 1964. As you are no doubt aware, it is my feeling that so far as DePinto is concerned, you have not been able to consider the issues involved in the above-mentioned action with complete objectivity. It should be fair to point out that your rulings in this case and in the companion case of Gorsuch v. Provident

Security Life Insurance Company have been consistently erroneous. Certainly this could not be expected from a Judge of your calibre and reputation had you been able to view the position of DePinto in proper perspective.

In all fairness to my client, I must urge that you consent to the transfer of the case to another Judge. Needless to say, this is a difficult letter for me to write in view of my high regard for your judicial capabilities and personal integrity. On the other hand, I would be derelict in my duty to my client if I didn't make this appeal to your sense of fairness.

Mr. McLane refers to the pending action of Fireman's Fund v. Duhame, DePinto, et al., Civil No. 5204 Phx. I assume that you have no responsibility with respect to that action.

With kindest personal regards,

Sincerely,

JSJ;af
cc: Messrs. McLane, Otto, Crable,
Gary and Drysdale, Anderson & Sabo

EXHIBIT B

UNITED STATES DISTRICT COURT
Western District of Washington

Chambers of
GEORGE H. BOLDT
United States District Judge
Tacoma, Washington

New York City
October 9, 1964

Mr. Jos. S. Jenckes, Jr.
363 North First Avenue
Phoenix, Arizona 85003

Re: Gorsuch & Doig v. Provident Security
and DePinto & Duhame - Civ. 2974 Phx.

Dear Mr. Jenckes:

Since mid September I have been heavily engaged in court assignments in the East and am now in a trial here that probably will not be concluded for several weeks. These circumstances account for the delay in my receipt of and response to your letter of September 24.

While I am not in the slightest offended at your request that I consent to a transfer of the above-captioned case to another judge, in good conscience I cannot agree thereto either as a personal matter or in the interests of sound judicial administration. I am not aware of any basis in fact for your feeling that I have not been or hereafter will not be completely objective in considering any matters in the case relating to your client DePinto or to any other party or attorney involved. I have no personal acquaintance with any litigant and all I know of the case is from the files and record made in open court.

In my opinion the reversal of several of my rulings in no manner indicates that I am not "able to view the position of DePinto in proper perspective." In the appellate brief for DePinto on the second appeal the request you now make to me was submitted to the Court of Appeals. I have no information, other than what appears in the opinion, but since no affirmative action was taken on your request, presumably it was considered and denied by the Court of Appeals. Nevertheless, please feel free to file any formal application you may wish to

submit to either the district or appellate court and be assured that, so far as I am concerned, neither you nor your client will be prejudiced thereby.

The clerk advises that the summary judgment motion in Civ. 5204 has been set for hearing before Judge Craig on October 12 from which it would appear your assumption that I have no responsibility in that action is correct.

Your letter and copy of this response are forwarded to the clerk for filing in the above-numbered cause.

Personal greetings and good wishes,

Sincerely
George H. Boldt
United States District Judge

CC-Messrs. McLane; Otto; Crable; Gary; and Drysdale, Anderson & Sabo; Clerk

EXHIBIT C

Memorandum

Room 2090 U.S. Courthouse
Philadelphia, Pa.
November 9, 1964

TO: Messrs. McLane; Jenckes; Otto; Crable; Gary; Drysdale, Anderson & Sabo

FROM: Judge George H. Boldt

SUBJECT: Gorsuch & Doig v. Provident Security & DePinto & Duhame - Civil No. 2974 Phx.

From the several responses to my 10/29/64 memo it appears all counsel responding would be convenienced by

fixing hearing on plaintiff's motion for partial summary judgment and other matters pending in the above cause to commence 10:00 a.m. December 2, 1964. It is now so ordered.

Plaintiff's counsel are directed to serve and file on or before 11/23/64 an exhibit or memorandum setting out the particular evidence of record on which the motion for partial summary judgment is based. Each defendant is directed to serve and file on or before 10/30/64 an exhibit or memorandum setting out any particular evidence of record on which defendant relies in opposition to said motion.

Memoranda in support of any other motion or matter to be considered at the hearing shall be served and filed on or before 11/23/64 and opposition memoranda shall be served and filed on or before 11/30/64.

George H. Boldt
United States District Judge

APPENDIX B

In the United States Court of Appeals
For the Ninth Circuit

No. 18245

ANGUS J. DEPINTO, HJALMAR B. LANDOE, FRANCIS I. SABO AND EDWIN B. PEGRAM, ELMER W. DUHAME, *Appellants*,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, AND JOHN S. GORSUCH AND ALBERT J. DOIG, *Appellees*.

Petition of Angus J. DePinto for Rehearing

Comes now Appellant, Angus J. DePinto, and, pursuant to Rule 23 of the Rules of this Court, respectfully petitions for a rehearing of this cause and requests that upon such rehearing the judgment of this Court shall be modified as follows:

(1) That this cause shall be remanded to the United States District Court for the District of Arizona with instructions to enter judgment for Appellant, Angus J. DePinto.

(2) That in the event this cause is remanded to the United States District Court for the District of Arizona for a new trial, further proceedings herein shall be heard by a judge, other than the Honorable George H. Boldt, to be designated by the Chief Judge of this Circuit pursuant to Section 292(b), Title 28, U.S.C.

This Petition is based upon the following grounds:

A. Request That Lower Court Be Instructed to Enter Judgment for Appellant.

Upon the original trial of this action the jury rendered

a verdict against Niesz, Sabo, Pegram and Landoe in the amount of $20,000.00. The jury rendered a special verdict wherein it found that DePinto was not guilty of negligence or breach of fiduciary duty which proximately caused or contributed to cause loss and damage to United Security Life. (Tr. 304) Plaintiff moved that all of the verdicts be set aside and that judgment be entered against DePinto and others in accordance with plaintiff's Motion For a Directed Verdict which was made at the close of the testimony. (Tr. 306) Plaintiff did not join with his Motion For Judgment a Motion For New Trial, nor did he pray for a new trial in the alternative. Judgment was entered pursuant to plaintiff's Motion. (Tr. 354)

In its opinion herein, this Court states:

> "While appellees did not move for a new trial, and the trial court did not purport to grant one, the necessary effect of the order setting aside the verdict was, for the reasons indicated, to grant a new trial. Accordingly, we cannot at this time concern ourselves with the question of whether the trial court should have set aside the verdicts."

The justification for viewing the action of the lower court as the granting of a new trial with respect to the defendants against whom "inadequate" verdicts had been rendered does not apply to DePinto. The jury verdict was in his favor. The lower court had no alternative other than to enter judgment for DePinto for the reason that "where uncertainty arises, either from a conflict of testimony, or because the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law, but of fact to be settled by the jury." *Hagan & Cushing Co. v. Washington Water Power Co.* (9 Cir.) 99 F. 2d 614, 617.

So far as DePinto is concerned, the action of the trial court was, in both form and substance, no more or less than the granting of Judgment N.O.V. The lower court had no jurisdiction to grant a new trial except in strict accordance with Rule 50(b) or Rule 59 of the Federal Rules of Civil Procedure. Plaintiff did not move for a new trial, and the trial judge lost jurisdiction to grant a new trial, on his own initiative, ten days after the entry of judgment. *Gilliland v. Lyons* (9 Cir.) 278 F. 2d 56. The jurisdictional limitation cannot be avoided by labeling or treating a Judgment N.O.V. as an order granting a new trial. The judgment was in no sense an interlocutory order. It was a final judgment which this Court had the power and duty to review under the provisions of Section 1291 of Title 28, U.S.C.

Where a Judgment N.O.V. has been erroneously granted and the successful party has not, in the alternative, asked for a new trial—or where the request for new trial has not been urged—then upon reversal by a court of appeals the case should be remanded to the lower court with instructions to enter judgment on the verdict.

Hanson v. Ford Motor Company (8 Cir.) 278 F. 2d 586.

Hansen v. Firestone Tire & Rubber Co. (6 Cir.) 276 F. 2d 254.

Vera Cruz v. Chesapeake & Ohio Railroad (7 Cir.) 312 F. 2d 330.

Edwards v. United States (6 Cir.) 140 F. 2d 526.

Bruin v. Tribble (4 Cir.) 238 F. 2d 12.

B. Change of Judge.

This cause was originally tried before the Honorable George H. Boldt, sitting with a jury, in March of 1960. With respect to the issue of merger, this Court, in a foot-

note to its opinion in *Niesz v. Gorsuch* (9 Cir.) 295 F. 2d 909,911, called attention to the failure of the trial judge to give careful consideration thereto. At the close of all of the evidence Judge Boldt refused to give effect to a jury verdict in favor of the appellant, DePinto, and granted judgment for the plaintiff N.O.V. He erroneously refused to recognize the verdict of the jury as having any binding effect. Appellant, DePinto, filed a Motion For New Trial raising numerous legal questions and also pointing out specific errors in the Findings of Fact entered by the lower court. (Tr. 361) The lower court apparently gave little, if any, consideration to the Motion, notwithstanding the fact that Finding No. 19(d) was contrary to the undisputed evidence. (Tr. 340; Ex. 5H)

After the judgment was reversed by this Court in Cause No. 17114 and the case remanded for further proceedings, the Honorable trial judge again failed to give objective consideration to the legal and factual questions raised by appellant, DePinto. At a pretrial conference held on March 9, 1962, Judge Boldt admonished attorneys for the defendants that they should not "go shopping" for another judge; that he intended to stay with the case until its conclusion. So far as known to DePinto and his attorneys, this caveat was wholly unprovoked.

DePinto moved that judgment be entered in his favor upon the jury's verdict and in the alternative demanded a trial by jury of all of the issues involved herein. (Tr. 1630) The Motion was summarily denied. (Tr. 1710) Notwithstanding DePinto's objections, Judge Boldt entered Supplemental Findings of Fact and Conclusions of Law wherein he failed to correct or modify his original Finding No. 19(d) which was contrary to the evidence. (Tr. 1712) In addition to again entering judgment

against DePinto in the amount of $314,794.19, Judge Boldt elected to include interest thereon from October 18, 1957, which had the effect of increasing DePinto's liability to the extent of approximately $100,000.00. (Tr. 1746)

After the remand of this case to the lower court following the first appeal, Gorsuch filed an action against Provident Security Life Insurance Company for the purpose of attempting to set aside the merger of United Security Life with Provident. In that case, Judge Boldt was persuaded to enter a default against Provident and a "Summary Judgment" setting aside the merger. In treating Provident in such a cavalier manner, Judge Boldt erred in at least four particulars. We refer to the Court to its opinion in *Provident Security Life Insurance Co. v. Gorsuch,* No. 18,307, entered on October 1st, 1963.

The Honorable George H. Boldt has been reversed twice in this case and once in the *Provident* case. The record clearly demonstrates the inability of Judge Boldt to view the affairs of United Security Life with that degree of judicial detachment and objectivity which should govern all actions of a trial judge. Further proceedings in this case should be heard before a judge designated by the Chief Judge of this Circuit pursuant to Section 292(b), Title 28, U.S.C.

U. S. v. Hatabley (10 Cir.) 220 F. 2d 666.

U. S. v. Ritter (10 Cir.) 273 F. 2d 30.

Respectfully submitted,
Herbert Mallamo
Evans, Kitchel & Jenckes
By Jos. S. Jenckes, Jr.
Attorney for Appellant,
Angus J. DePinto

APPENDIX C

In the United States Court of Appeals
For the Ninth Circuit

No. 18245

Order

ANGUS J. DEPINTO, HJALMAR B. LANDOE, FRANCIS I. SABO AND EDWIN B. PEGRAM, ELMER W. DUHAME, *Appellants*,

v.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, AND JOHN S. GORSUCH AND ALBERT J. DOIG, *Appellees*.

On Petitions for Rehearing

Before: BARNES, HAMLEY and JERTBERG, Circuit Judges

The petitions for rehearing of appellants Angus J. DePinto and Elmer W. Duhame are denied.

Stanley N. Barnes

Frederick G. Hamley

Gilbert H. Jertberg
United States Circuit Judges

APPENDIX D

Phoenix, Arizona, December 2, 1964; 1:30 o'clock p.m.

(The appearances were the same as before.)

THE COURT: Gentlemen, after careful reading of the cases, and I re-read a good many of them, and after a re-reading of the affidavit and the arguments, I feel that I have no other alternative but to arrive at this decision, and I will read it as I wrote it here:

The Court rules that the Affidavit of Bias and Prejudice filed in Case No. Civil 2974 Phoenix by Defendant Angus J. DePinto seeking to disqualify the Honorable George H. Boldt from presiding further as judge in this case be denied, and the Plaintiff's motion to strike the said Affidavit be granted, for the reasons that the said Affidavit is not sufficient, in that the Affidavit fails to show facts or reasons to indicate personal bias or prejudice on the part of the Honorable George H. Boldt against the Defendant Angus J. DePinto, and for the further reason that the Affidavit is not timely, in that virtually all of the same facts and reasons expressed in the Affidavit filed herein were previously raised and rejected by the Court of Appeals, and as to those facts and reasons not previously raised and later added to the Affidavit, the Court finds that these additional facts and reasons are insufficient to alter the Court's decision.

Now, basically I think that the cases do not indicate, at least to me, and *this is not part of the decision*, I am just commenting on it, do not indicate that merely because a judge makes an erroneous ruling, or rules against the parties, particularly in a case of this kind where apparently they were procedural matters involved, and as far as I can see that was not basically touched on the facts. But in any case I feel that where the Court makes

erroneous rulings, and they are reversed, I don't think this in and of itself, even if you add several of them together to warrant a sufficient showing under the statute and the decisions to indicate bias and prejudice, and I also think that since the matter was presented to the Ninth Circuit for all except that motion that is now pending, which really actually hasn't been determined yet anyway, as to just what the Court is or is not going to do, other than I guess the Court has indicated to you he is going to hear it, if the matter should come before him, I feel that their ruling on this foreclosed my in a sense finding differently from the Court of Appeals.

* * *

(Emphasis supplied)